SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1073

TRAP ROCK INDUSTRIES, INC.,
a New Jersey Corporation,
Petitioner,

vs.

JOHN C. KOHL, Commissioner of Transportation, and
JAMES R. SCHUYLER, State Highway Engineer,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Counter-Statement of Questions Presented

1. Should the petition for writ of certiorari, seeking review of the summary suspension of the petitioner's right to bid on contracts with New Jersey Department

of Transportation, be denied due to matters [illegible] the petitioner has subsequently been debarred from bidding on the basis of the conviction for bribery of its President and principal stockholder?

Should the Court consider the petitioner's claims that its privilege against self-incrimination has been violated and that the suspension of its right to bid on contracts with the New Jersey Department of Transportation constituted a bill of attainder, where petitioner failed to raise these issues in the State courts below?

Is a State contracting agency constitutionally compelled to enter into contracts with a contractor, in the face of a grand jury's finding that there is a prima facie basis for the conclusion that the President and principal stockholder of the contractor is guilty of attempting to bribe a public official?

Counter-Statement of Case

On March 17, 1971, a New Jersey State Grand Jury returned an indictment charging Michael J. Stavola and [illegible] with attempting to bribe a State Senator in a criminal charge then pending against Stavola and obstructing justice.

On March 29, 1971, the petitioner Trap Rock Industries, Inc. (hereinafter "Trap Rock") was notified that the indictment of Stavola, the principal of the corporation (80% stockholder, Chairman of the Board of Directors and President), was deemed by the Commissioner of Transportation to be a development affecting the responsibility of Trap Rock as a bidder on public works contracts with the State.

A hearing was held before the Commissioner on May 6, 1971 at which Trap Rock was given the opportunity to present information to substantiate its classification. Michael A. Stavola, the principal of Trap Rock, refused to present any information other than to note his plea of not guilty to the charges made in the indictment. Counsel for Trap Rock also refused to consent to an examination of the Grand Jury records by the Commissioner. On May 7, 1971, the Commissioner issued his decision that Trap Rock was temporarily suspended from bidding on State contracts until satisfactory explanation as to the charges contained in the indictment was adduced to persuade the Department of Transportation that the principal of Trap Rock, Stavola, possessed the requisite moral integrity to be allowed to bid on State contracts.

On June 30, 1971, the Appellate Division reversed the determination of the Commissioner, holding that the suspensions were illegal because of the absence of competent evidence establishing the commission of the alleged offenses. On November 22, 1971, the Supreme Court of New Jersey reversed the judgment of the Appellate Division and affirmed the action of the Commissioner. At no time during the course of this case through the courts of New Jersey did petitioner raise the issues that the Commissioner's action violated its privilege against self-incrimination or otherwise constituted a bill of attainder in violation of Article 1, §10 of the United States Constitution.

On November 22, 1971, Stavola was convicted in Monmouth County Court of the crimes of bribery and obstructing justice. Stavola was sentenced on January 21, 1972 to a term of not less than one year nor more than two years. A hearing was held by the State of New Jersey on February 15, 1972 to consider the advisement

of all companies in which Stavola has a substantial interest from bidding upon any procurement requirements with agencies of the State. As a result of this hearing, the Commissioner issued an order on March 16, 1972 debarring petitioner from doing any business with the State Department of Transportation for a period of five years.

ARGUMENT

POINT I

The petition for writ of certiorari to review the affirmance by the Supreme Court of New Jersey of the temporary suspension of petitioner's right to bid on contracts with the New Jersey Department of Transportation should be denied due to mootness, because the petitioner has subsequently been debarred from bidding on the basis of the conviction for bribery of its President and principal stockholder.

The issue which the petitioner seeks to bring before this Court is whether the New Jersey Commissioner of Transportation improperly "suspended" it from bidding on contracts to be awarded by the Department of Transportation:

> "until satisfactory explanations for the items contained in the indictment are addduced to satisfy this Department that Michael J. Stavola/Trap Rock Industries, Inc. possesses the moral integrity to qualify as a bidder." (128a).

However, the issue of the petitioner's suspension is now moot since, subsequent to the filing of the petition, petitioner was debarred from bidding for a period of five

years. This debarment was based on the conviction of Michael J. Stavola on the charges of bribery and obstructing justice contained in the indictment which was the basis for the original suspension.

After Stavola was convicted and sentenced, a hearing was held by the Commissioner of Transportation on February 15, 1972 to consider why Stavola and any of his corporations, including petitioner, should not be debarred from doing business with the State. As a result of this hearing, the Commissioner issued an order on March 16, 1972 debarring Stavola, petitioner and several other corporations in which Stavola had a substantial interest from doing business with the State for a period of five years. Since the only issue decided by the Supreme Court of New Jersey was the validity of the temporary suspension and the temporary suspension has been superseded by a five-year debarment based upon the criminal conviction of Stavola, the case is now moot.

An excellent illustration of this Court's refusal to give opinions upon moot questions may be found in *Local No. 6 v. Missouri*, 361 U. S. 363 (1960). In that case, a labor union had appealed from a judgment of the Supreme Court of Missouri affirming a decree which enjoined the union from continuing a strike against a public utility. During the litigation the strike ended and the injunction expired by its own terms. This Court held that the controversy was moot, stating that:

> "The decision we are asked to review upheld only the validity of an injunction, an injunction that expired by its own terms more than three years ago. Any judgment of ours at this late date would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had

already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain.' Brownlow v. Schwartz, 261 U.S. 216, 217, 218 . . ." 361 U. S. at 371.

Similarly, in the present case an affirmance or reversal of the court below would be meaningless since the temporary suspension in question has expired and been replaced by a debarment.

POINT II

The petition for writ of certiorari must be denied as to the petitioner's claims that its privilege against self-incrimination has been violated and that the suspension of its right to bid on contracts with the New Jersey Department of Transportation constituted a bill of attainder because petitioner failed to raise them in the state courts below.

The Court has often stated that it will not decide Federal constitutional issues raised for the first time in review of state court decisions. In *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969), the Court after stating this general rule, went on to explain:

> "In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. §1257, there are sound reasons for this. Questions raised below are those on which the record is very likely to be inadequate, since it certainly was not com-

> piled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 U.S. 92 (1966), they should be given the first opportunity to consider them." 394 U.S. at 439

Accordingly, Rule 23 (f) of the Court's Rules provides that if review of the judgment of a state court is sought, the petition must specify the stage in the proceedings below, at which, and the manner in which, the Federal questions sought to be reviewed were raised; the method of raising them; and the way in which they were passed upon by the court.

Petitioner failed to comply with Rule 23(f) as to at least two issues, those numbered four and five of the petition's "Question's Presented." The Supreme Court of New Jersey wrote a carefully reasoned twenty-three page opinion. At no time does this opinion touch upon the questions of whether the Commissioner's action in suspending Trap Rock from bidding violated petitioner's Fifth Amendment right to remain silent or constituted a bill of attainder in violation of Article 1, §10 of the United States Constitution. Moreover, petitioner did not raise these issues in its sixty page brief filed on the merits. In fact, the petitioner did not even cite in its brief below the main cases relied on in its petition to support its self-incrimination and attainder arguments:

i.e., *Spevack* v. *Klein*, 385 U. S. 511 (1967); *Garrity* v. *New Jersey*, 385 U. S. 493 (1967); *Stevens* v. *Marks*, 383 U. S. 234 (1966); *United States* v. *O'Brien*, 391 U. S. 367 (1968); *United States* v. *Lovett*, 328 U. S. 303 (1946); *United States* v. *Brown*, 381 U. S. 437 (1965); *Garner* v. *Board of Public Works*, 341 U. S. 716 (1951). In short, these issues are afterthoughts which the petitioner has sought to raise for the first time in the petition for writ of certiorari filed with this court.

Therefore the petition for writ of certiorari must be denied as to at least the petitioner's claims that its privilege against self-incrimination has been violated and that the suspension of its right to bid on contracts constituted a bill of attainder because petitioner failed to raise them in the state courts below.

POINT III

The Commissioner of Transportation, in suspending a bidder whose principal refused to explain an indictment charging an attempt to bribe a public official, acted in full accordance with fundamental fairness and due process of law.

It is well settled that a governmental agency:

> ". . . enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127 (1940).

Accordingly, the New Jersey Legislature has mandated that the Department of Transportation do business with

"the lowest responsible bidder." N.J.S.A. 27:7-30. It has been clear in New Jersey for more than ten years that the concept of "responsibility" embraces moral integrity just as surely as it embraces a capacity to supply labor and materials. *Arthur Venneri Co. v. Paterson Housing Authority*, 29 N. J. 392, 403 (1959); *Mal-Bros. Contracting Co. v. Kohl*, 113 N. J. Super. 144, 147 (App. Div. 1971), certif. den. 58 N. J. 94 (1971).

Nevertheless the petitioner contends that by basing a suspension of a contractor upon an unexplained outstanding indictment of its principal stockholder, president and chairman of the board of directors, the Commissioner of Transportation violated its right to due process of law. Petitioner argues that since an indictment is not proof of its own allegations in the criminal trial itself, the Commissioner should not have been permitted to consider the indictment at the suspension hearing. However, an indictment does mean that a basis exists to believe the charge if the evidence on hand is not explained or contradicted. *Beavers v. Henkel*, 194 U. S. 73 (1904); *State v. Winne*, 12 N. J. 152, 178 (1953); 8 *Moore, Federal Practice* (2nd ed.) §603 [2], pp. 6-14. The indicted individual, Stavola, was given full opportunity before the Commissioner of Transportation to explain the allegations of the indictment, but refused to do so. Since conviction of the crime of bribing a public official would certainly justify debarment from bidding (as in fact has happened), an unexplained indictment for such a crime must be considered to be a proper basis for the suspension from such bidding, or else government would be powerless to refuse to do business with an alleged corrupt contractor pending the disposition of criminal charges.

Petitioner further questions why it should be suspended from bidding when its controlling stockholder was in-

dicted, and not the corporation itself. However, corporations are often held accountable for the misbehavior of their principals. In fact, in *Campbell Painting Corp. v. Reid*, 20 N. Y. 2d 370, 283 N. Y. S. 2d 31, 229 N. E. 2d 602 (Ct. App. 1967), *affirmed*, 392 U. S. 286 (1968), the Court upheld the statutory disqualification from bidding for five years by the New York City Housing Authority of a corporation because its *former* president (also a director and ten percent stockholder) had refused to sign a waiver of immunity before a grand jury investigating bid rigging. This result was reached even though all other officers, directors and controlling stockholders of the closely held corporation appeared before the grand jury and indicated a willingness to sign waivers of immunity and to testify. Thus the moral responsibility of a corporation, which necessarily must be controlled and operated by individuals, is one and the same with the moral responsibility of those individuals.

The chief thrust of the petition for writ of certiorari is that the Commissioner's action in suspending petitioner is invalid due to the absence of any rules or regulations which could forewarn bidders that if a principal of their corporation were indicted for bribery then the corporation's prequalification for bidding might be suspended if the principal did not adequately explain such indictment. In making this argument, the petitioner relies very heavily upon *Gonzalez v. Freeman*, 334 F. 2d 570 (D. C. Cir. 1964), which held that under the Federal Administrative Procedure Act the Commodity Credit Corporation may not *debar* a contractor in the absence of:

> ". . . administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to

present evidence and, to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made." 334 F. 2d at 578.

In *Gonzalez*, the suspended and subsequently debarred contractor never did have the opportunity to refute the charges against him at a hearing. In the present case, on the other hand, no action was taken against the petitioner until its principal, Michael Stavola, was given ample opportunity to explain his indictment at a full hearing before the Commissioner of Transportation. Furthermore, *Gonzalez* involved the procedural requirements for a *debarment* while the instant case involves merely a temporary suspension. In fact, the court in *Gonzalez* expressly stated that "a summary debarment, in the nature of a temporary suspension, might be warranted for a reasonable period pending investigation." 334 F. 2d at 579. Accordingly, the court did not disapprove of the fact that Gonzalez had been temporarily suspended for a period of over twenty-eight months, half of which passed before even the return of the indictment. In the present case, no action was taken until the petitioner's principal had been indicted *and* given an opportunity to explain the allegations of the indictment.

A different result in the instant case would force agencies of the State to enter into contracts with a contractor in the face of a grand jury's finding that there is a *prima facie* basis for a conclusion that the contractor is presently lacking the requisite moral integrity to do business with the State. The public interest certainly justifies a refusal to engage a contractor pending resolution of a criminal charge bearing upon moral responsibility. Nothing in the Constitution required the Commissioner

of Transportation to award public contracts to companies controlled by Michael Stavola while the State Government simultaneously expended public funds to prosecute Stavola on charges which, if proved (as they subsequently were), would establish beyond a doubt that he is not fit to hold the public trust.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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